

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA

FILED  
U.S. BANKRUPTCY COURT  
WESTERN DISTRICT OF NC

MAY - 5 1989

IN RE:

A.J. NIELSON and wife,  
DORIS NIELSON,

Debtors.

) Case No. A-B-87-0439  
) Chapter 12

WARREN L. TADLOCK, CLERK  
BY: [Signature]  
Deputy Clerk

JUDGMENT ENTERED ON 05-05-89

ORDER DENYING MOTION TO MODIFY PLAN

This matter is before the court on the debtors' Motion to Modify Chapter 12 plan and the objections to the proposed modification filed by the Trustee and Farmers Home Administration ("FmHA"). The court has concluded that the motion for modification must be denied.

The debtors filed their Chapter 12 petition in September 1987. After four attempts and much negotiation among the debtors, the Trustee and FmHA, a plan was confirmed in September 1988 upon the consent of the parties in interest. (A history of this case is set out in this court's Order of May 4, 1989, and needs not be repeated here). The confirmed plan provided in pertinent part that: (1) the Trustee would sell all of the debtors' land except Lot 2-A, an eighteen acre tract on which was located a rock house and facilities of an apple juicing plant; (2) sixty days after that sale of land, the Trustee would sell

Lot 2-A; and (3) the debtors' contemplated moving to modify the plan prior to sale of Lot 2-A in order to permit them to retain it.

The Trustee has conducted the initial sale of the debtors' land contemplated by the plan. However, in addition to excepting Lot 2-A from the initial sale, the Trustee also did not sell Lot 2-B, a thirty acre tract that adjoins Lot 2-A and which is separated from road access by Lot 2-A. The Trustee chose not to sell Lot 2-B at the initial sale because it was landlocked and he determined that it could produce a higher price for the estate if later sold along with Lot 2-A.

On March 20, 1989, the debtors filed their anticipated Motion to Modify Chapter 12 Plan. The debtors' modified plan proposes that: (1) the debtors retain Lot 2-A and Lot 2-B; (2) the debtors pay First Union Bank the full amount of their lien at eight and one-half percent interest over a ten year period; (3) the debtors assert that the total value of the two tracts proposed to be retained is \$125,000 and the "recovery value" established in 7 U.S.C. § 2001 is \$105,000 and the debtors propose to pay FmHA that amount at eight and one-half percent interest over twenty-five years; (4) the debtors would apply any disaster relief funds received for the 1988 crop to reduce secured debt and reduce the debtors' monthly payments accordingly; and (5) payment of the debtors' additional attorney's fees as an administrative expense to be paid from funds held by the Trustee.

The Trustee and FmHA have raised a number of objections which the court does not have to resolve at this time because the fatal problem with the proposed modification is that it is not feasible. After hearing all the debtors' evidence, and taking it in the light most favorable to the debtors, there has been an insufficient showing to satisfy the feasibility requirement of 11 U.S.C. § 1225(a)(6). There was not a sufficient showing of income that was in prospect to support a finding that the debtors would have the ability to make all the payments required by their proposed modified plan.

Mr. Nielson's testimony about the debtors' sources of income can be summarized as follows:

(1) **Harvest of Apple Crop** -- Tract 2-B contains a number of apple trees which could be harvested. Nielson "guess[ed]" that this could generate \$5,000 to \$6,000 per year. However, this represents gross revenue and assumes that Nielson would do all of the work himself. He cannot tolerate the sun, so all of the work would have to be done in the morning or evening hours. Although this was not entirely clear, it appears that all of the equipment formerly used in the debtors' apple orchard operation has been sold by the Trustee, so the debtors have no equipment to care for or harvest the apple crop. There was also no demonstration of the ability to acquire the supplies or equipment necessary to successfully harvest a marketable apple crop.

(2) **Rental of Apple House** -- There exists on Lot 2-A a metal and concrete block structure that was used in the apple farming operation and is known as an "apple house." Nielson testified that it could be rented for \$600 - \$700 per month for uses other than an apple house. William Burch, the debtors' real estate witness testified that there was not much demand for apple houses. Nielson testified that he has had several "inquiries": one about leasing one-third of the building; one about leasing one-fourth of the building; one who was "interested" in the entire building; and another group who "could be" interested. But, the debtors have no executed leases, no actual proposed leases and no tenant actually in prospect. In addition, substantial structural modifications would have to be made to the building before it could be occupied by a tenant. Nielson admitted that that would take ninety days. Moreover, there was no evidence that the debtors have the ability to pay for (or finance) those modifications -- and, any tenant-made modifications would likely reduce the rent paid.

(3) **Rental of the Rock House** -- There exists on Lot 2-A a rock house that is occupied by a craft shop owned by Mrs. Nielson's mother. Nielson testified that this "could be" rented for \$400 per month. Although there apparently is no formal lease, Nielson testified that the rock house is leased to his mother-in-law's craft shop for \$400 per month, but that the monthly rent is credited against the balance of upfitting done by the tenant and that it will be July or August 1989 before any rent is actually paid to the debtors.

(4) **Mrs. Nielson's Income** -- Nielson testified that Mrs. Nielson works part-time for her mother at the craft shop. She is not actually being paid anything at the present time, but Nielson claimed she could earn \$200 per week.

(5) **Mr. Nielson's Income** -- Nielson is not presently working and has not worked in the past few years outside of apple farming. He testified that he "has to do something," but "has no idea" what kind of work he could do. There was no evidence that he had any employment prospects or that he had actually sought any.

(6) **Disaster Relief Payments** -- The debtors may be entitled to a disaster relief payment for their 1988 apple crop. It is not known whether, in what amount or when those funds might be paid. But, in any event it appears that those funds would not be available for the debtors' discretionary use.

The income sources and projections Nielson identified would produce the following annual income (using the maximum ranges suggested):

Apple Crop	\$ 6,000
Apple house rent	8,400
Rock house rent	4,699
Mrs. income	10,000
Total	\$ 29,200

Nielson estimated his monthly payments to secured creditors (which is based on his valuations\*) would be \$1,500 per month or

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\* The court makes no findings and expresses no opinion on the debtors' evidence as to the value of Lots 2-A and 2-B (and, thus, the amount of FmHA's secured debt) or of the propriety of valuing FmHA's secured debt at only the "recovery value."

\$18,000 per year. Thus, even using the brightest forecast by the debtors, it appears that after paying taxes and living expenses it is quite likely that the debtors would not have sufficient income to make payments that would be required by their modified plan.

But, bright forecasts aside\*, the fact of the matter is that, with the possible exception of Mrs. Nielson's ability to obtain a \$200/week salary, none of the debtors' income sources are actually in prospect. Instead, they are so speculative as to border on pure fantasy: The apple crop cannot be harvested without supplies and equipment, which do not exist. (Moreover, the crop will not be ready for harvest until the fall of 1989). There are no prospective tenants for the apple house and it would take 90 days to put in in condition to rent. No rent is to be paid on the rock house until July or August. And, Mr. Nielson has no prospects for employment. So, it appears that all the debtors would actually have available to make the payments proposed by the modified plan is Mrs. Nielson's \$800/month salary with the addition of \$400/month rent from the rock house starting in July or August. Consequently, the debtors' own evidence is that they could not pay the estimated \$1,500 per month payments from the very outset of the modified plan and continuing for a significant period of time.

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\* The debtors' monthly report for May 1988 showed a net income of \$384-88; and the debtors' highest monthly net income reported was \$1,056.

In sum, the court concludes that the debtors have failed to demonstrate sufficient income that is in prospect in order to make the payments required by the proposed modified plan. In fact, it appears that there would be an immediate and continuing default if the modified plan were confirmed. Consequently, the proposed modification must be disapproved and the debtors' motion denied.

It is therefore ORDERED that:

1. The debtors' proposed modification of the plan is disapproved; and
2. The debtors' Motion to Modify Chapter 12 Plan is denied.

This 5th day of May, 1989.

  
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George R. Hodges  
United States Bankruptcy Judge